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No. 06-819

IN THE

Supreme Court of the United States

MARSHALL K. FLOWERS AND ANNA K. FLOWERS,
PETITIONERS,

V.

UNITED STATES ARMY, 25TH INFANTRY DIVISION; FORT JACKSON FEDERAL CREDIT UNION; FIRST HAWAIIAN BANK; UNITED STATES OF AMERICA; THOMAS E. WHITE, Secretary Of The Army; JOHN OHLWEILER, Captain,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENT FORT JACKSON FEDERAL CREDIT UNION IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

1. Whether the Magistrate's discovery order was properly reversed to bar re-deposition of Army personnel, based on the finding that testimony from Army personnel would be irrelevant to the remaining claims against Fort Jackson Federal Credit Union after dismissal of the Army;

2. Whether the Flowers' FRCP Rule 56(f) motion to stay summary judgment pending the re-deposition of Army personnel was properly denied, based on the conclusion that Fort Jackson Federal Credit Union's motion for summary judgment primarily involved questions of law on undisputed facts, there had been ample time for discovery, and there had been no showing that further discovery could lead to a different conclusion; and

3. Whether summary judgment was properly granted in favor of Fort Jackson Federal Credit Union.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Defendant-Respondent Fort Jackson Federal Credit Union, which name has changed to All South Federal Credit Union, does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

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OPINIONS AND ORDERS BELOW

The Court of Appeals' memorandum opinion affirming the District Court's decisions and order denying rehearing are both unreported. (Pet.App. 1a, and 2a-7a). The District Court's order reversing the magistrate's discovery order is reported at 289 F.Supp.2d 1213 (D.Haw. 2003). (Pet.App. 81a-97a; CR 388). The District Court's order granting summary judgment and denying FRCP Rule 56(f) stay of summary judgment is reported at 295 F.Supp.2d 1130 (D.Haw. 2003). (Pet.App. 59a-80a; CR 443).

JURISDICTION

The memorandum opinion of the Court of Appeals was entered on April 7, 2006, and Judgment thereon was filed October 10, 2006. (Pet.App. 2a-7a). The Court of Appeals' order denying rehearing was entered on September 14, 2006. (Pet.App. 1a). The petition for a writ of certiorari was filed on December 6, 2006. Plaintiff-Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). Defendant-Respondent Fort Jackson Federal Credit Union ("FJFCU"), which name has changed to All South Federal Credit Union, does not dispute jurisdiction.

CONSTITUTIONAL PROVISIONS, TREATISES, STATUTES, ORDINANCES, AND REGULATIONS

The points on appeal directed at FJFCU, involve 12 U.S.C. §§ 3402 and 3413 of the Right to Financial Privacy Act (12 U.S.C. §§ 3401-3422)("RFPA"), as well as Rules 26, 56(a) and 56 of the Federal Rules of Civil Procedure ("FRCP").

CONCISE STATEMENT OF THE CASE

Petitioner-Plaintiff Marshall Flowers was a Sergeant Major of the United States Army, who had been apprehended for alleged shoplifting at the military Post Exchange at Schofield Barracks, Hawaii, in December of 1997. Subsequently, the United States Army ("Army") conducted a criminal investigation of Petitioner-Plaintiffs Marshall Flowers and Anna Flowers (the "Flowers"), in relation to the return of duplicate merchandise on multiple occasions to Army and Navy Exchanges, in exchange for cash.

As a part of the Article 32 investigation, subpoenas were issued to FJFCU and First Hawaiian Bank ("FHB"), for the production of Mr. Flowers' financial records. The FJFCU

subpoena was issued on June 24, 1998. The face of the FJFCU subpoena plainly stated that the documents were for "a General court-martial of the United States...appointed by MG James T. Hill, to provide evidence in the matter of United States v. SGM Marshall Flowers...Failure to appear...is punishable by a fine...or imprisonment...10 U.S.C. § 847...[or] being taken into custody and brought before the court-martial... Manual for Court Martial R.C.M. 708(e)(2)(G)."

The Flowers filed suit against the Army, FHB and FJFCU, alleging in part that FJFCU did not comply with the relevant provisions of the RFPA when it released the Flowers' financial records.

Initially, the Flowers noticed the depositions of Army personnel and FJFCU employees without consideration to the location and schedule of witnesses, or the schedule of defense counsel. However, through a myriad of e-mails, the parties agreed to block off a week for the depositions, and to conduct the depositions in the location of the witness. Approximately a week before the scheduled depositions, counsel for the Flowers confirmed the depositions. However, the Flowers subsequently asserted within days of the scheduled depositions, that they could not attend. The Flowers did not appear at the depositions, nor did they file a protective order or discovery motion to prevent the depositions from going forth.

Immediately prior to the dispositive motions cutoff, the Flowers submitted a discovery motion to the Magistrate, seeking to re-depose Army witnesses. The Magistrate permitted the Flowers to re-depose Army witnesses, conditioned upon the Flowers' reimbursement of one-half defendants' costs in conducting the new depositions, and time restrictions. The Flowers appealed the Magistrate's discovery order to lift the conditions, making their first motion before the District Court to re-depose Army Witnesses.

In the mean time, the Army filed a motion for summary judgment. The District Court dismissed the claims against the

Army pursuant to *Feres v. United States,* 340 U.S. 135 (1950), and concurrently held that the testimony of Army personnel would therefore be irrelevant to the remaining claims against FHB and FJFCU, reversing the Magistrate's discovery order in so far as it permitted re-deposition of Army witnesses.

Thereafter, FJFCU moved for summary judgment on the RFPA claims based upon the statutory exception provided within 12 U.S.C. § 3413(e). The Flowers moved to continue the motion for summary judgment pending discovery pursuant to FRCP Rule 56(f), seeking a second time to re-depose Army witnesses. The Flowers argued that it was necessary to re-depose Army witnesses to determine whether the FJFCU subpoena was "manufactured" *ex post facto* in 2002 (not 1998) to conform to an opinion in the case of *Flowers v. First Hawaiian Bank,* 295 F.3d 966 (9th Cir. 2002).[1] The District Court awarded summary judgment in favor of FJFCU, and denied the Flowers' motion to continue holding that (1) the issues involved are primarily questions of law, (2) there had been ample time for discovery, (3) there was no showing that further discovery could lead to a different conclusion, (4) no evidence supported allegations that the FJFCU subpoena was manufactured after the fact, and (5) the FJFCU subpoena squarely fit within the RFPA exception under 12 U.S.C. § 3413(e).

In an unpublished memorandum opinion, the Court of Appeals affirmed the award of summary judgment in favor of FJFCU, concluding that the subpoena issued to FJFCU satisfied the exception to RFPA liability under 12 U.S.C. § 3413(e). The Court of Appeals further affirmed the District Court's two rulings denying re-deposition of Army witnesses, declaring that the Flowers' challenge to discovery rulings were without merit.

Review on certiorari is not warranted in so far as the Court of Appeal's unpublished memorandum opinion is attributable to FJFCU. As to FJFCU, the Court of Appeal's decisions (1) do not

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[1] The opinion in *Flowers v. First Hawaiian Bank,* 295 F.3d 966 (9th Cir. 2002), set forth a four part test to determine the applicability of the RFPA exception 12 U.S.C. § 3413(e). *See* Section A, below.

address any a question regarding *Feres*, the only important question of law the Flowers purport to raise on certiorari, (2) do not conflict with any decision of another Federal court of appeal or state court of last resort, and (3) do not present departures from the accepted and usual course of judicial proceedings. Accordingly, there is no good cause for this Court's review of decisions attributable to FJFCU.

I. Statutory Scheme

The RFPA prescribes standards and procedures that the government must follow when subpoenaing a bank customer's financial records. The RFPA requirements are subject to a number of statutory exceptions, including the exception enumerated in 12 U.S.C. § 3413(e), as follows:

> Nothing in [the RFPA] shall apply when financial records are sought by a Government authority under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts in connection with litigation to which the Government authority and the customer are parties.

12 U.S.C. §3413(e) (1999) (emphasis added) (*see* Pet.App. 111a).

The Ninth Circuit Court of Appeals has set forth the following four part test in determining the applicability of 12 U.S.C. § 3413(e):

> This exemption has four requirements, all of which must be met for it to apply: the applicable financial records must be sought by (1) a governmental authority, (2) under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts, (3) in connection with litigation, (4) to which the governmental authority and the customer are parties.

See Flowers v. First Hawaiian Bank, 295 F.3d 966, 971 (9th Cir. 2002).

The Fifth Circuit Court of Appeals has further interpreted 12 U.S.C. § 3413(e), holding that a financial insitution is entitled to rely upon the exception even where the Army failed to comply with its own regulations governing Court Martial and subpoenas. *See Roberts v. Sabine State Bank & Trust Co.*, 226 F.3d 374, 375 (5th Cir. 2000) (emphasis added); *see also Ismail v. Old Kent Bank & Trust Co.*, 893 F.2d 1334 (6th Cir. 1990) ("even if the subpoenas were somehow defective, the bank would still not be civilly liable [under the RFPA] if there was a good faith reliance on the subpoenas").

II. Factual Background

The factual background has been succinctly summarized by the District Court for the District of Hawaii, in its Order Granting In Part and Denying In Part Motions for Summary Judgment (*see* Pet.App. 63a-69a; CR 443) as follows:

> In December of 1997, Sergeant Major Marshall Flowers was apprehended for alleged shoplifting at the military Post Exchange at Schofield Barracks, Hawaii, after he was observed apparently shoplifting on a security video. Prior to December of 1997, the Army had been investigating Flowers because he had returned duplicate items on multiple occasions to Army and Navy Exchanges, often without receipts, in exchange for cash. From December 1997 until March 1998, a military Criminal Investigation Division ("CID") investigated the conduct of both Marshall and Anna Flowers. Among other evidence, a search of his residence found numerous duplicate and unopened electronic, computer, and other high-value items. Also found were multiple refund receipts and what is described as "homemade" refund receipts on his computer.
>
> In April of 1998, the Army filed 42 charges of larceny against Flowers. An Article 32 investigation was begun but proceedings were postponed at the request of defense counsel until June of 1998.

On June 24, 1998, a DD Form 453 subpoena was issued by the United States Army to Fort Jackson FCU in South Carolina requesting "all bank account in formation since 1 Jan 97, to include #582593." ***It also cited Section 847 of the Uniform Code of Military Justice regarding punishment for failure to comply with the subpoena as well as a "Manual for Courts-Martial R.C.M. 703(e)(2)(G)." The subpoena differed on its face from the subpoena issued to First Hawaiian Bank because it stated that the documents were for "a General court-martial of the United States... appointed by MG James T. Hill to provide evidence in the matter of United States v. SGM Marshall Flowers."*** In contrast, the subpoena issued to First Hawaiian Bank was stated to be for "an Article 32 hearing," which is preliminary to a court-martial proceeding.

There appears to be no dispute that when the Fort Jackson FCU subpoena was issued there was not as yet any actual General Court-Martial proceeding ongoing (except perhaps to the extent an Article 32 could be considered as a necessary prerequisite to -- and therefore part of -- a court-martial). Perhaps the Army only intended to use the documents if the proceedings reached the court-martial stage, or perhaps the subpoena was wrong. The deposition testimony of Major Ohlweiler, the officer who signed both subpoenas, indicates the Fort Jackson FCU subpoena contained erroneous language. ("The paralegal typed it out and I signed it, and he or she, and I don't remember who it was, wrote General Court-Martial rather than Article 32")]. In any event, there is no evidence that anyone from Fort Jackson FCU knew (or had reason to know) that the documents were, at that point anyway, for an Article 32 hearing rather than for a General Court-Martial. ***A cover letter from Ohlweiler to Fort Jackson FCU accompanying the subpoena stated that "SGM Flowers is currently facing a Court-Martial for 42 specifications of larceny."*** Fort Jackson FCU complied with the subpoena by mailing credit union account statements to the Army on July 2, 1998.

An Article 32 hearing was conducted from June 25 to June 26, 1998. On July 16, 1998, the Army investigating officer

issued a report reviewing the evidence and recommended that the charges against SGM Flowers be adjudicated in a trial by General Court-Martial. The report does not mention financial records, and all evidence indicates that the financial records were not used (or even received by the Army) in that Article 32 proceeding.

Marshall Flowers was represented at the Article 32 hearing by military lawyers and civilian lawyer Charles Gittins. Mr. Gittens specializes in military defense cases and is known for handling "high profile" cases involving charges against, among others, the former Sergeant-Major of the Army and the Navy Commander in the U.S.S. Greenville submarine incident with the Japanese fishing vessel Ehime Maru.

After the Article 32 hearing, Mr. Gittens contacted then-Capt. Ohlweiler or Capt. Bagwell, the Army's prosecutors for the proceeding, about "cutting a deal." Gittens told the Army that he was interested in "saving Sergeant Major Flowers' retirement, and that was his top priority, and. .. wanted to propose that [the Army] would dismiss the charges and that Sergeant Major Flowers would accept punishment under Article 15, and would immediately submit his retirement.". Gittens prepared a "Memorandum of Agreement for Alternative Disposition of Charges," under which the Army would withdraw the charges and Flowers would accept non-judicial punishment under Article 15 of the UCMJ and make an immediate request for retirement with leave to begin on September 1, 1998. Flowers signed the agreement on June 26, 1998; the Army signed it on August 4, 1998.

At some point thereafter, Flowers chose instead to proceed with the court-martial. This was against the advice of his lawyers. Army defense counsel told Flowers, after consultation with other military lawyers and Mr. Gittens, that "disposition by Article 15 is a real victory for the defense" and that "Given the videotape evidence against you, it is very unlikely that you will be completely acquitted." Counsel advised "I can find no reason for you to demand trial by court-martial in this case. As your legal advisor, I genuinely

believe demanding a trial by court-martial is irresponsible and totally unsound.... I urge you to reconsider and accept the Article 15 offered to you in this case." Although it is not exactly clear from the present record, it appears that Flowers accepted the advice. In any event, a second "Memorandum of Agreement for Alternative Disposition of Charges" was signed by Flowers and his lawyer, Charles Gittens, on August 22, 1998 and by the Army on August 28, 1998.

An Article 15 hearing was then held on August 28, 1998. The proceedings allow an accused to present matters in defense of the charges or to mitigate punishment. Flowers and military defense counsel attended, but apparently did not present any defense or evidence. Flowers was found to have committed several acts in violation of Article 121 (larceny) of the UCMJ, and punishment was imposed in the form of forfeiting $1,788 per month for two months and receiving a formal letter of reprimand. The records released by First Hawaiian Bank and Fort Jackson FCU that are the subject of this action were not presented in the Article 15 proceeding.

Flowers appealed the Article 15 punishment. (As part of the appeal, Flowers treats the financial information as exculpatory as he argued: "Documents were subpoenaed referencing my bank account. The withholding of these documents at the Article 32 investigation prejudiced the outcome of this case."). The appeal was denied by General Hill.

Marshall Flowers did not immediately submit retirement papers as set forth in the Memorandum of Agreement. According to an affidavit of Marshall Flowers, the Article 15 punishment was "withdrawn" and, on November 13, 1998, the charges were re-preferred. A second Article 32 hearing was eventually held on March 18 and 19, 1999. The result of the second hearing appears to have been favorable to Flowers. The recommendation apparently was for "administrative separation" or "administrative disposition" although General Hill and military prosecutors had

> apparently decided to proceed with a General Court-Martial anyway.
>
> At this point, Flowers' term of service expired on May 13, 1999. As an enlisted soldier, to remain in the service, he needed to reenlist. On April 27, 1999, Flowers' immediate supervisor imposed a formal "bar to re-enlistment," effectively ending his military career at 28 years. The bar to re-enlistment cited the previous non-judicial punishment (the Article 15 proceedings and findings of violations of Article 121). The commanding officer indicated that he "only recently learned that a bar had not been imposed previously, as would have been appropriate." General Hill approved the bar and testified that such a bar should have been imposed long before as a matter of course once charges were preferred.
>
> On May 27, 1999, military counsel on behalf of Flowers appealed the bar to re-enlistment through Army channels. The appeal was denied on June 21, 1999. General Hill then directed that Flowers had 14 days to submit his retirement. Flowers presumably then retired with military benefits. He has claimed on several occasions that he was forced to retire with 28 years of service when his goal was 30 years.

(*See* Pet.App. 63a-69a; CR 443) (emphasis added, internal citations of evidentiary support omitted).

III. Procedural Background

On June 21, 2001, Mr. Flowers individually filed suit against the Army and FJFCU in the District Court for the District of Hawaii, alleging violations of the RFPA, 12 U.S.C. § 3401 et seq. On September 18, 2001, Mr. Flowers filed his First Amended Complaint. (CR 13).

Upon motion by FJFCU, on November 21, 2002, the District Court consolidated the two related cases, *Flowers v. First*

Hawaiian Bank, Civ. No. 99-00335 and *Flowers v. United States Department of the Army and Fort Jackson Federal Credit Union*, Civ. No. 01-0041. (CR 92).

On April 24, 2003, the Flowers jointly filed the Second Consolidated Amended Complaint against FHB, the Army and FJFCU. (CR 222). This was the first time that Mrs. Flowers had properly brought suit against FJFCU.

On April 16, 2003, the Flowers noticed the depositions of Major John Ohlweiler and Major Randy Bagwell to be conducted in Honolulu, Hawaii in May 2003. These depositions were noticed without consideration to the schedules of the witnesses or the defense. (*See also* CR 251, at p. 4). Likewise, on May 23, 2003, the Flowers noticed the depositions of FJFCU employees Velma Jones and Kenneth Creticos to be conducted in Honolulu, Hawaii in June 2003, again without confirming the availability of witnesses or the defense. However, through a myriad of subsequent e-mails, counsel for the Flowers and counsel for the defense agreed that the Flowers would depose Army witnesses General James T. Hill, Major John Ohlweiler, and Major Randy Bagwell, as well as FJFCU employees Velma Jones and Kenneth Creticos, all during the week of July 21, 2003, at the physical locations the respective witnesses in Washington, D.C., Miami, Florida and Columbia, South Carolina. (Opp.Pet.App., Appendix "A", at 2a; CR 318). As late as July 17, 2003, counsel for the Flowers confirmed the dates of the depositions. (*Id.*). FJFCU noticed the depositions of the Army witnesses accordingly, and the Army noticed the depositions of FJFCU witnesses. (*Id.*). The five witnesses were prepared for deposition, the schedules of the witnesses were cleared for deposition, the schedules of defense counsel were cleared for deposition, and travel arrangements were made for defense counsel to travel from Hawaii to the continental United States. Within days of the scheduled depositions, the Flowers suddenly indicated that they would be unable to attend. (*Id.*) Neither the Flowers nor their attorney appeared at the depositions. The Flowers did not file a timely discovery motion or motion for protective order to prevent the depositions from going forward. (*Id.*)

Nonetheless, on September 11, 2003, the Magistrate Judge granted the Flowers' discovery motion to re-depose the five witnesses by November 30, 2003, provided (1) the depositions be conducted in the location of the deponent (not Hawaii) by November 30, 2003, (2) the depositions be limited to two hours, (3) the Flowers reimburse Defendants for half the cost incurred in the new depositions, and (4) the depositions could be taken by telephone or video conference. (Opp.Pet.App., at 2a-3a; CR 318; Pet.App. 95a).

Rather than re-depose Army witnesses as allowed, the Flowers appealed the Magistrate's discovery order on September 18, 2003, requesting that the above conditions be lifted. (CR 326). This was the Flowers' first motion made before the District Court, to re-depose Army witnesses. In the meantime, the Army filed a motion for summary judgment based on the *Feres* doctrine. (CR 388).

On October 31, 2003, the District Court dismissed the claims against the Army. (Pet.App. 83a-95a; CR 388). The District Court also concurrently reversed the Magistrate's discovery order in so far as it related to the re-deposition of Army witnesses, holding that ***"given the dismissal of the [Army], the testimony of the Army witnesses is irrelevant" to the remaining claims against FJFCU and FHB*** (hereinafter "Order Reversing Magistrate's Discovery Order"). (Pet.App. 95a-97a; CR 388). In other words, the District Court denied the Flowers first motion to re-depose Army witnesses. However, the Flowers were free to re-depose the FJFCU witnesses.

On October 22, 2003, FJFCU filed Motion for Partial Summary Judgment Re: RFPA Claims. (CR 375). Therein, FJFCU explained:

> ... a subpoena is exempt from the RFPA under §3413(e) where records are sought by (1) a governmental authority, (2) under the Federal Rules of Civil or Criminal Procedure or comparable rules of other courts, (3) in connection with litigation, (4) to which the governmental authority and the

customer are parties. 12 U.S.C. 3413(e) (1999); *See also Flowers v. First Hawaiian Bank*, 295 F.3d 966, 971 (2002). Based on Plaintiffs' own allegations, all of these criteria are satisfied and FJFCU is entitled to judgment as a matter of law.

* * * *

...it is clear that a subpoena issued pursuant to a court-martial meets the second requirement of 12 U.S.C. 3413(e). The subpoena issued to FJFCU clearly stated on its face that it was issued pursuant to a General court-martial proceeding.

Furthermore, it is irrelevant whether the subpoena was, in fact, issued in an Article 32 proceeding when, on its face, the subpoena that is actually issued clearly states that it is pursuant to a "General court-martial"....Since FJFCU's subpoena states on its face that it is a subpoena in a "General court-martial", the subpoena does not invoke nonexistent legal authority as the basis for its issuance. In fact, a closer look at the June 24, 1998 subpoena directs the receiver [FJFCU] to look at "R.C.M. 708(e)(2)(G)" for legal authority regarding this particular subpoena. As indicated above, RCM 708(e)(2)(G) clearly provides that a subpoena may be issued by a court-martial. Therefore, FJFCU had legal authority and a basis for responding to the subpoena.

(CR 375 (citations omitted)).

On November 13, 2003, the Flowers filed a Rule 56(f) Motion to Stay FJFCU's Summary Judgment Proceeding Pending Discovery ("Rule 56(f) Motion"), seeking a second time to re-depose Army witnesses. (CR 404, 408). The Flowers asserted that re-deposition of Army witnesses was necessary to determine whether the FJFCU subpoena issued in 1998 was perhaps "manufactured" *ex post facto* in 2002 to conform to an opinion in the case of *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir.

2002)[2], and FJFCU's alleged culpability thereto. (Pet.App. 71a).

The Flowers re-deposed the FJFCU witnesses on November 17, 2003. (CR 445, Exhibits. G - H).

The District Court subsequently granted FJFCU's Motion for Partial Summary Judgment Re: RFPA claims, and denied the Flowers' Rule 56(f) Motion on December 5, 2003 (hereinafter "Order Denying Rule 56(f) Motion"). (CR 445). The District Court reasoned as follows:

> The Court DENIES Plaintiffs' request for a continuance under Rule 56(f) ***because the issues involved are primarily questions of law on undisputed facts, because there has been ample time for discovery, and because there has been no showing that further discovery could lead to a different conclusion.***
>
> * * * *
>
> ***Facially, ... the [FJFCU] subpoena was one that fits within an exception [to the RFPA]. There was no way Fort Jackson FCU would have, or should have, known that the underlying proceeding had not yet reached a court martial stage. As stated earlier, the Army in the subpoena's cover letter reiterated that the information was needed for a General Court Martial. Even if the Army incorrectly listed the subpoena, perhaps prematurely, as being for a General Court Martial, this is not Fort Jackson FCU's fault.*** *See Roberts v. Sabine State Bank & Trust Co.*, 226 F.3d 374, 375 (5th Cir. 2000) (applying section [12 U.S.C.] 3413(e) and finding bank not liable under the RFPA for disclosures made during a General Court Martial even if the Army violated its own regulations).

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[2] The opinion in *Flowers v. First Hawaiian Bank*, 295 F.3d 966 (9th Cir. 2002), set forth a four part test to determine the applicability of the RFPA exception 12 U.S.C. § 3413(e). *See* Section A, below.

> ***Despite the Plaintiffs' arguments to the contrary, there is absolutely no evidence that the [FJFCU] subpoena was "manufactured" or otherwise fraudulently created after the Ninth Circuit's opinion in Flowers [v. First Hawaiian Bank, 295 F.3d 966 (9th Cir. 2002)] so as to fit within the language of the opinion.*** All the evidence indicates that the subpoena in the record is the subpoena issued on June 24, 1998 that led to the financial disclosures at issue in this action. Because the subpoena facially met the requirements under section 3413(e) and because there is absolutely no indication that [FJFCU] had reason to know that the subpoena might have been improper, the Court GRANTS [FJFCU's] motion for partial summary judgment. ***The subpoena fits squarely within the "litigation exception" to the RFPA under 12 U.S.C. § 3413(e).***

(*See* Pet.App. 61a, 70a-71a; CR 443)(emphasis added).

In an unpublished Memorandum Opinion, the Ninth Circuit Court of Appeals affirmed the award of summary judgment in favor of FJFCU, concluding "***The record establishes that [FJFCU] is not liable under the RFPA because the subpoena issued to [FJFCU] satisfies an exception to liability under 12 U.S.C. § 3413(e).***" (Pet.App. 5a-6a) (emphasis added). The Court of Appeals also upheld the Circuit Court's decisions to reverse the Magistrate's discovery order and deny the Flowers' Rule 56(f) Motion to re-depose Army witnesses, "conclud[ing] that they are also without merit." (Pet.App. 6a).

ARGUMENT

Rule 10 of the Supreme Court Rules ("SCR") provides in relevant part:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following,

although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

> (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

Guided by SCR Rule 10, it is clear that the Flowers have not raised issues of the character necessary for review by the United States Supreme Court.

As to FJFCU, the Court of Appeal's unpublished decisions do not (1) address any question regarding *Feres,* the only important question of law the Flowers purport to raise on certiorari, (2) conflict with any decision of another Federal court of appeal or state court of last resort, and (3) present departures from the accepted and usual course of judicial proceedings. Review by this Court is therefore unwarranted.

I. The Court of Appeals Has Not Decided A Question Regarding the *Feres* Doctrine As To Fort Jackson Federal Credit Union

The Flowers, by their own characterization, have only placed questions regarding *Feres* before this Court. However, the decisions attributable to FJFCU have no relationship to the *Feres* doctrine. Accordingly, there is no good cause for this Court's review of decisions attributable to FJFCU.

The Flowers' concede in a subsequent brief to this Court, that their sole contention on appeal is "whether *Feres* v. *United States,*

340 U.S. 135 (1950), bars [the Flowers'] claims under the [RFPA]..." (Opp.Pet.App., Appendix "B", at 4a)(internal quotations omitted). With respect to FJFCU, the Petition asks that this Court decide whether "the [lower] court's import of *Feres* prohibited the Flowers from obtaining discovery of [Army] witnesses to adequately respond to [FJFCU's] motion[] for summary judgment." (Pet.App. 25)(emphasis added).

The decisions attributable to FJFCU should not be reviewed on certiorari however, because, contrary to the Flowers' mischaracterization, said decisions did not address, involve, apply, import or reject the *Feres* doctrine. The only decisions attributable to FJFCU are (1) the District Court's decision to reverse the Magistrate's discovery order in so far as it permitted re-deposition of Army witnesses (*see* Order Reversing Magistrate's Discovery Order), (2) the District Court's decision denying the Flower's Rule 56(f) Motion to re-depose Army witnesses (*see* Order Denying Rule 56(f) Motion), (3) the District Court's award of summary judgment in favor of FJFCU (*see* Order Denying Rule 56(f) Motion), and (4) the Court of Appeals' decisions affirming the same. Memorializing these decisions attributable to FJFCU in written opinions, the Court of Appeals and District Court clearly framed their decisions as issues of fact and relevance to the RFPA – not a question of law as to *Feres*.

The Order Reversing Magistrate's Discovery Order unambiguously states that the District Court's decision to reverse the Magistrate's discovery order permitting re-deposition of Army witnesses, was based on its finding that "*the testimony of the Army witnesses is irrelevant*" to the remaining claims against FJFCU. (Pet.App. 95a-97a; CR 388).

Likewise, the Order Denying Rule 56(f) Motion specifies that summary judgment was granted in favor of FJFCU because "[t]he [FJFCU] subpoena fits squarely within the 'litigation exception' to the RFPA under 12 U.S.C. § 3413(e)." (Pet.App. 70a-71a; CR 443). The Order Denying Rule 56(f) Motion further indicates that the Rule 56(f) Motion to re-depose Army witness was denied "because the issues involved are primarily questions of law on

undisputed facts, because there has been ample time for discovery, and because there has been no showing that further discovery could lead to a different conclusion." (Pet.App. 61a; CR 443).

The Court of Appeals' memorandum opinion makes no mention of *Feres* as well, providing in relevant part:

> The record shows that the Flowers failed to produce or cite any evidence to establish a genuine issue of material fact sufficient to overcome summary judgment. The record establishes that [FJFCU] is not liable under the RFPA because the subpoena issued to [FJFCU] satisfies an exception to liability under 12 U.S.C. § 3413(e). There is also no indication that the Flowers are entitled to compensatory or punitive damages as the record evidence provides no connection between the conduct of [FHB] or [FJFCU] and the Flowers' claimed damages, and nothing suggests that [FHB] or [FJFCU] acted willfully or intentionally to violate the Flowers' rights under the RFPA. 12 U.S.C. § 3417(a) (3). Furthermore, the Flowers' tort claims against [FJFCU] lack any evidentiary support in the record. We must therefore conclude that the district court did not err in granting summary judgment to [FHB] or [FJFCU].
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> * * * *
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> We have considered exhibits the Flowers' remaining miscellaneous contentions – including...the Flowers' challenge to a number of the district court's discovery rulings – and we conclude that they are also without merit.

(Pet.App. 5a-6a) (footnotes omitted).

The memorandum opinion and underlying orders make no reference to *Feres* when discussing the bases of decisions attributable to FJFCU. Moreover, such decisions are limited to fact bound issues regarding (1) the relevance of testimony from Army witnesses, and (2) the FJFCU subpoena.

The only question of federal law raised by the Flowers is the *Feres* doctrine. However, the *Feres* doctrine is neither the basis for the Court of Appeal's decisions attributable to FJFCU, nor the basis for the District Court's underlying decisions attributable to FJFCU. Failing to raise questions of important federal law with respect to decisions attributable to FJFCU, review on certiorari thereof should be denied.

II. The Flowers Make No Argument That Conflict Exists Between The Court of Appeals' Decisions Attributable To Fort Jackson Federal Credit Union And The Decisions of Other Federal And State Courts

The Flowers make no argument or showing that conflict exists between the Court of Appeals' unpublished decisions as to FJFCU, and the decisions of other federal courts or state courts of last resort. The Flowers are unable to do so as the Court of Appeals' decisions are in accord with those of other courts.

Although no state court of last resort has addressed the issue, the Fifth and Sixth circuits have reviewed the summary adjudication of 12 U.S.C. § 3413(e) defenses, in the presence of a subpoena which is alleged to be procedurally defective. The Fifth and Sixth circuits are also the only courts publishing opinions which attend to the relevance of a government entity's conduct, to the RFPA claims against a subpoenaed financial institution.

In the case of *Roberts v. Sabine State Bank & Trust Co.*, 226 F.3d 374 (5th 2000), *certiorari denied*, 532 U.S. 909 (2001), the Fifth Circuit was presented with facts strikingly similar to the facts here. In *Roberts*, the Army issued a subpoena for the disclosure of a bank customer's financial records pursuant to the Rules of Court Martial. The bank customer filed suit against the subpoenaed financial institution for violations the RFPA. Subsequently, summary judgment was entered in favor of the financial institution based upon 12 U.S.C. § 3413(e). On appeal, the bank customer argued that 12 U.S.C. § 3413(e) was not applicable because the subpoena at issue was defective. Specifically, the bank customer

asserted that Army failed to comply with its own notice and challenge (hearing) provisions when issuing the subpoena. The Fifth Circuit agreed that the subject subpoena was issued in violation of the Army's own rules governing subpoenas. *Id.*, at 376. Nonetheless, the Fifth Circuit affirmed the award of summary judgment, holding:

> We agree with the district court that if this case were against the Army, those regulations may be pertinent. However, Roberts has sued the Bank. Even if the Army assumed greater responsibilities than the RFPA requires, the Bank is not deprived of the right to rely on the exemption Congress created in Section [12 U.S.C. §] 3413(e).

Id. (emphasis added). The Fifth Circuit's ruling essentially sets forth a financial institutions' right to rely a subpoena that purports to be proper, irrespective of the Army's conduct in issuing the subpoena.

In *Ismail v. Old Kent Bank & Trust Co.*, 893 F.2d 1334 (6th Cir. 1990), *certiorari denied*, 493 U.S. 962 (1990), the Sixth Circuit was presented with an appeal of summary judgment awarded pursuant to 12 U.S.C. § 3413(e). The bank customer argued that summary judgment should not have been awarded in favor of the financial institution as the subpoena was "unenforceable because they were issued by an assistant United States attorney without judicial approval." *Id.* In other words, plaintiff argued that the subpoenas were defective as they did not comply with the rules of procedure. The Sixth Circuit found that the subpoenas had been properly issued by the court upon application by the U.S. attorney. *Id.* However, the Sixth Circuit went on to say "Moreover, even if the subpoenas were somehow defective, the bank would still not be civilly liable if there was a good faith reliance on the subpoenas." *Id.* (emphasis added). Affirming the lower court's award of summary judgment, the Sixth Circuit, like the Fifth Circuit, applied a standard to RFPA claims and 12 U.S.C. § 3413(e) defenses, which looks to the face of subpoena and the financial institution's state of mind, rather than

the conduct of the government or procedural propriety of the subpoena.

Like the decision in *Roberts* and the circumstances discussed in *Ismail,* the Court of Appeals here affirmed an award of summary judgment in favor of FJFCU pursuant to 12 U.S.C. § 3413(e) because the subpoena facially "satisfies[d]...12 USC § 3413(e)." (Pet.App. 5a). The FJFCU subpoena clearly identifies that the subpoena was issued in relation of a "General court-martial" and that "Failure to appear...is punishable by a fine...or imprisonment...10 U.S.C. § 847... [and] may...result in...being taken into custody and brought before the court-martial...Manual for Court Martial R.C.M. 708(e)(2)(G)." (Pet.App. 65a; CR 443; CR 376, Exhibit "B"). Although "[t]he deposition testimony of Major Ohlweiler...indicates the Fort Jackson FCU subpoena contained erroneous language..., there is no evidence that anyone from Fort Jackson FCU knew (or had reason to know) that the documents were, at that point anyway, for an Article 32 hearing rather than for a General Court-Martial." (Pet.App. 65a; CR 443).

The Court of Appeals here also affirmed the District Court's two decisions barring re-deposition of Army witnesses, in a manner consistent with the decisions in *Roberts* and *Ismail.* (Pet.App. 6a). As stated above, the courts in *Roberts* and *Ismail,* essentially held that the government's conduct and the procedural propriety of the subpoena are irrelevant to RFPA claims against a financial institution. Here, the District Court first reversed the Magistrate's discovery order in so far as it permitted re-deposition of Army witnesses, finding that "the testimony of the Army witnesses is irrelevant" to the remaining claims against FJFCU and FHB. (Pet.App. 97a; CR 388). The District Court next denied the Flowers' Rule 56(f) Motion to re-depose of Army witnesses, based in part on the conclusion that "there has been no showing that further discovery could lead to a different conclusion" regarding the RFPA claims against FJFCU. (Pet.App. 61a; CR 443). Essentially, the District Court's decisions to bar the re-deposition of Army witnesses, in both instances, were based on its finding that the Army's conduct and the propriety of the FJFCU subpoena are

irrelevant to the RFPA claims against FJFCU, as well as the FJFCU's 12 U.S.C. § 3413(e) defense to the RFPA.

Accordingly, there is no conflict between the Court of Appeals' decision to affirm summary judgment in favor of FJFCU and deny re-deposition of Army witnesses, and the decisions of other federal appellate courts or state courts of last resort. As such, there is no compelling reason to grant review of the decisions attributable to FJFCU.

III. The Flowers Make No Argument That There Has Been a Departure From the Accepted And Usual Course of Judicial Proceedings As To Decisions Attributable to Fort Jackson Federal Credit Union

The Flowers make no argument or showing that the Court of Appeals has either so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by the lower court with respect to decisions attributable to FJFCU, so as to call for an exercise of this Court's supervisory power.

In fact, this Court has previously declined to exercise its supervisory power, when presented with points on appeal identical to those raised against FJFCU here. As discussed above, the case of *Roberts,* 226 F.3d 374 (5th 2000), involved the appeal of summary judgment on RFPA claims awarded in favor of the financial institution. The Fifth Circuit affirmed the lower court's award of summary judgment, holding that the Army's failure to comply with its own rules governing the subpoena, was irrelevant to the financial institution's right to rely on the RFPA exception in 12 U.S.C. § 3413(e). *Id.*, at 376. On petition for writ of certiorari, this Court denied review. *Roberts v. Sabine State Bank & Trust Co.,* 532 U.S. 909 (2001).

In the instant case, the Flowers seek this Court's review of summary judgment on RFPA claims in favor of FJFCU. The Flowers' primary contentions are that the Court of Appeals erred in affirming summary judgment as (1) the FJFCU subpoena was procedurally defective, and (2) that the Flowers should have been

permitted to present evidence of said procedural flaws. Like this Court's decision in *Roberts,* 532 U.S. 909, this Court should decline to exercise its supervisory power for absence of departure from the accepted and usual course of judicial proceedings.

CONCLUSION

Based on the foregoing reasons, FJFCU respectfully submits that the Flowers' Petition for Writ of Certiorari should be denied as to decisions attributable to FJFCU.

Respectfully submitted,

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